JOHN D'SILVA & ANOR

v.

ANTHONY MOSES

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-03-150-2000]
7 MARCH 2002

CIVIL PROCEDURE: *Res judicata - Nature and scope of doctrine - Whether judge precluded by doctrine of res judicata from dealing with point raised*

CIVIL PROCEDURE: *Pleadings - Striking out statement of claim - Whether appropriate for court to enter into merits of application to strike out*

This was an appeal by the appellants against the decision of the judge in dismissing their application to strike out the statement of claim.

Held:
Per Gopal Sri Ram JCA

[1] The learned judge fell into error when he thought that he was precluded by the doctrine of *res judicata* from dealing with the point raised. However, the differing with the judge on this point produced no unfavourable consequences in this case. (pp 536 b-c, g)

[2] The plaintiff (respondent) had put in an application to amend his pleading to correct an error based on which the defendants (appellants) made their application. Consequently, it was inappropriate for this court to enter into the merits of the application to strike out. (p 536 i)

[Appeal dismissed; order of judge upheld.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan oleh perayu-perayu terhadap keputusan hakim yang menolak permohonan mereka untuk membatalkan pernyataan tuntutan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Hakim yang bijaksana telah khilaf apabila memikirkan bahawa beliau dihalang oleh doktrin *res judicata* dari berurusan dengan isu yang dibangkitkan. Walau bagaimanapun, percanggahan dengan hakim di atas isu ini tidak menyebabkan ketidakcenderungan akibat di dalam kes ini.

[2] Plaintif (responden) telah memasukkan permohonan untuk meminda plidingnya untuk memperbetulkan kesilapan yang menjadi asas kepada defendan (perayu-perayu) untuk membuat permohonan mereka. Berikutan itu, adalah tidak wajar bagi mahkamah ini untuk mencampuri merit kepada permohonan untuk pembatalan.

[Rayuan ditolak; perintah hakim dipertahankan.]

Case(s) referred to:
Carl-Zeiss Stiflung v. Rayner & Keeler Ltd & Ors (No 2) [1966] 2 All ER 532 ***(refd)***
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 ***(refd)***
Johnson v. Gore Wood & Co [2001] 1 All ER 481 ***(refd)***

For the appellant - Azhar Azizan Harun (Karina Yong); M/s Shafee & Co
For the respondent - R Ledchumiah; M/s Ramamoorthy Ledchumiah & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S2(S5) 23-27-99]

Reported by Raja Vishnu Sivarajah

JUDGMENT
(oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
This is a defamation case coupled with a cause of action mounted for wrongful dismissal. The one arises out of the other: the first from the second.

The writ in this case was served on 9 March 1999. Defence was delivered on 23 November 1999 and the reply on 17 February 2000. An application for security for costs was taken out on 5 August 1999. It was heard and refused by the judge on 25 October 1999.

The action had by then gone into case management. On 23 May 2000, that is to say some one year and two months after the issuance of the writ, the defendants (appellants before us) took out an application to strike out the statement of claim. They failed. They now appeal to us and ask us to reverse the judge.

The learned judge advanced two reasons for dismissing the application. First, he thought that he was precluded by the doctrine of *res judicata* from dealing with the point raised. In this, he fell into error. The doctrine of *res judicata* is not a technical doctrine. It is an illustration of the operation of equity in the field of procedure, that is to say adjectival law. Whether you call it issue estoppel, cause of action estoppel or *res judicata* matters not. A court is not to apply any of these branches of estoppel in a staccato and straightjacket fashion. The court is bound to weigh the merits of the case and determine where justice lies.

If upon an examination of all the circumstances of the case, the court concludes that it would be unjust for a party in a given case to re-ventilate a point, or to ventilate a fresh point which he could fairly have raised in earlier proceedings, then it may no doubt be justified in coming to the conclusion that it would be unjust to permit the plaintiff to succeed. It would accordingly admit, as successful, a plea of procedural estoppel; be it cause of action estoppel, issue estoppel or *res judicata*. On the other hand, if the judge comes to the opposite conclusion on the facts, then of course, the plea of procedural estoppel may not succeed. Or to put it more accurately, the court will not permit the plea to succeed. This much is clear in the speech of Lord Upjohn in the case of *Carl-Zeiss Stiflung v. Rayner & Keeler Ltd & Ors. (No. 2)* [1966] 2 All ER 532. That view of the matter was affirmed and followed by Lord Bingham of Cornhill in his speech in *Johnson v. Gore Wood & Co.* [2001] 1 All ER 481. It is noteworthy that in *Johnson (ibid)*, the plea of *res judicata* was not permitted to succeed. This court has applied these cases in *Chee Pok Choy & Ors. v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321. But, for the reasons which we will state in a moment, our differing with the judge on this point produces no unfavourable consequence in the case.

That brings us to the second ground advanced by the judge. He thought it was too late in the day, with case management nearing its tail end, to entertain the application to strike out. Although he expressed the view that the application had merits, he refused to grant it in the exercise of his discretion. The plaintiff has since then put in an application to amend his pleading to correct the error based on which the defendants made their application. In these circumstances, it is inappropriate for this court to enter

into the merits of the application to strike out. As we said a moment ago, this is a case involving the exercise of discretion. And the principles upon which this court acts in such matters are too well settled to merit recall. There is here no misdirection in law by the learned judge. Neither has he taken into account irrelevant considerations or omitted relevant considerations. He has not asked himself the wrong question. There is no manifest miscarriage of justice.

For the reasons already given we find it unnecessary to trouble counsel for the respondent to reply.

The appeal is dismissed. The order of the judge is upheld. All costs here and below shall follow the event of the trial. The deposit is to be refunded to the appellant.